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# In the
# Supreme Court of the United States

OCTOBER TERM, 1991

**No. 91-261**

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
PETITIONER,

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

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**No. 91-274**

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
PETITIONERS,

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

## BRIEF FOR MAYOR RAYMOND L. FLYNN AND THE CITY OF BOSTON AS AMICUS CURIAE.

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## BRIEF FOR MAYOR RAYMOND L. FLYNN AND THE CITY OF BOSTON AS AMICUS CURIAE.

### Interest of Amicus Curiae.

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of Mayor Raymond L. Flynn and the City of Boston, Massachusetts (City). The Mayor and

the City assert that the Court's ruling in this case would have a significant impact upon major construction projects within the City. Accordingly, the focus of this brief is to apprise the Court of the nature of such impact.

If the court of appeals decision is sustained, timely completion of construction projects within this City can no longer be ensured. When public construction is delayed, as a result of work stoppages, picketing, or strikes, the cost of such delay is borne by the taxpayer. Specifically, the City is forced to expend additional monies for project completion. These costs are then passed on to the residents and businesses of this City in the form of higher fees. Thus, the potential economic benefits to a city are often jeopardized where the project extends past its completion date. The utilization of Master Labor Agreements, however, increases the likelihood of meeting project deadlines, resulting in efficient spending of tax dollars. Such agreements also enable a city to plan and carry out transportation improvements and environmental projects in an effective manner.

**Boston Harbor Clean-up Project.**

The impact of this ruling upon the Boston Harbor Clean-up Project is enormous. This project is under a court ordered timeframe mandating that the harbor satisfy standards imposed by the Clean Water Act. *See United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991). Delays in the implementation of this clean-up project affect the economic and environmental well-being of this City.

In Boston, the Boston Water and Sewer Commission (BWSC) functions as the retail purchaser of water on behalf of

the residents and businesses of Boston. The Massachusetts Water Resources Authority (MWRA) operates as the wholesaler and charges the BWSC for the cost of purification. Consequently, when the cost of purification increases, City residents incur a higher rate for water use.

In 1985, the average annual water bill for a family of four residing within this City was $135.00. That same family paid $570.00 for water in the year 1992. It is projected that by the year 2000, it will cost this family of four $1400.00 per year to supply water to its household. In fact, the MWRA's wholesale rates are expected to incur double digit increases every year between now and the year 2000. These figures put Boston well above the national average. More importantly, however, these projected figures are based upon the assumption that the clean-up of Boston harbor occurs within the court ordered timeframe.

The residents and businesses of Boston are already financially overburdened with the cost of the harbor clean-up. Any delays in this project increase the cost to the MWRA, which is passed on to the water users within this City. The City maintains that such additional cost will be significant given the fact that 35% of the MWRA's revenues are derived from this City. It would be unjust to require the people of this City to incur further financial responsibility, as a result of project delays, for the clean-up of the harbor.

The Harbor Clean-Up Project has already created significant improvements in water quality. Prior to 1990, Boston harbor beaches were periodically closed after heavy rainfalls, when sewer overflows are most prevalent. However, in 1990 and 1991, the harbor beaches came very close to meeting water quality standards for swimming. Additionally, upgrading of water quality ensures that the fishing industry will continue to prosper. These improvements are a sign of this project's positive effect upon the City's environment.

However, even though improvements are evident, the harbor is still in violation of clean water standards. As dictated by the consent decree, the timeliness of this project is critical. Allowing this clean-up to fall past the date of completion results in a further degredation of the environmental quality of the harbor. The long term effect to the harbor and ocean could be devastating.

**Central Artery/Tunnel Project.**

The City is also concerned that this ruling could affect the Central Artery/Tunnel Project (CA/T). This project is utilizing a Master Labor Agreement similar to the present case. Should this Court rule that such agreements are unenforceable, delays in this project would greatly impact the City's economy and transportation systems.

The Central Artery serves as the region's North and South road into the City and was originally designed to move 75,000 vehicles per day. Today, it carries over 190,000 vehicles every day, the equivalent of more trucks and cars per lane than any interstate in America. It is among the most congested and dangerous highways in the nation with an accident rate three times the state average. Currently, traffic jams occur on the artery eight to nine hours daily. It is projected that without this project, this gridlock will extend to fourteen hours daily by the year 2010.

CA/T, a 5.8 billion dollar project, will depress this artery below the City and create an additional harbor tunnel to the airport, thereby alleviating traffic congestion in and around the City. CA/T is expected to be completed by 1998.

Timely completion of this project ensures that transportation into the City will be significantly improved. This, in turn,

results in economic benefits to its businesses. Specifically, the current recession within the Commonwealth has resulted in a high office vacancy rate within the City. A faster commute may attract other companies to relocate their offices downtown.

Efficient transportation fosters tourism as well which would serve to revitalize the economic growth of this City. Specifically, the project will allow for the creation of additional parkland in the City, which will dramatically improve pedestrian access.

Additionally, CA/T has resulted in the awarding of 31 million dollars in construction contracts to local companies. Further, this project will result in the direct creation of 10,500 jobs. It is projected that CA/T will generate over 450 million in annual sales for the next ten years in the metropolitan area.

Continuation of the Master Labor Agreement in place for this project ensures that CA/T will not serve to impede existing transportation within the City. Timely completion of the various phases of this project is essential to ensure that transportation continues to flow smoothly throughout the project. Project delays will not allow for such coordination.

The majority of this project is eligible for federal construction monies. However, such funding is appropriated annually. Thus, it is conceivable that delays may jeopardize the amount awarded for a particular year. Further, due to the sagging economy, construction contracts can be awarded at a lower cost right now. However, as the economy turns around, such prices will no longer be realistic. Thus, the cost of delays will increase at more than the rate of inflation.

This City badly needs the economic boost that this project will guarantee. Better transportation leads to more business, more tourism, and the creation of jobs. If the City cannot ensure a timely completion, delays will severely thwart the economic purposes of this project.

The City maintains that the court of appeals decision, holding that the National Labor Relations Act (NLRA) preempts the ability of a public entity to employ Master Labor Agreements, is in error. Therefore, the City urges the Court to reverse the judgment entered in this case by the United States Court of Appeals for the First Circuit.

Pursuant to Rule 37.5 of the Rules of this Court, consent to the filing of this brief is waived due to the City's status as a political subdivision of the Commonwealth of Massachusetts and its filing by the City's authorized law officer.

## Statement of the Case.

The statement of the case as set forth in the Solicitor General's Amicus Brief is adopted by the City for purposes of this brief amicus curiae.

## Summary of the Argument.

The City adopts the Solicitor General's arguments as stated in his amicus brief. Specifically, the City maintains that the use of Master Labor Agreements by state and local entities is not preempted by the NLRA. Preemption can be implied where there is direct regulation of labor relations by a governmental entity. However, the use of such agreements does not constitute such regulation. Rather, the public entity is merely exercising a proprietary right to mandate that contracts relating to a massive construction project conform to certain labor standards, grievance procedures, and no-strike requirements.

## Argument.

The City adopts the arguments as presented by the Solicitor General in his amicus brief and highlights the salient points of such arguments.

### I. The Use of Master Agreements in Public Construction Contracts Does Not Conflict With the Congressional Intention That Certain Labor-Related Conduct Remain Unregulated.

The *Machinist* preemption doctrine is applied where the activity in question is neither prohibited nor protected under the NLRA. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). The inquiry delineated by this doctrine requires an analysis of the legislative intent behind the NLRA. Specifically, the court must determine whether the state's activity conflicts with the NLRA's purpose in ensuring that certain labor-related conduct remain "unregulated" and left to "the free play of economic forces." *Machinist*, 427 U.S. at 140; *see also Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*) (focusing such inquiry on whether the state has entered into substantive aspects of the bargaining process to an extent not countenanced by Congress).

Sections 8(e) and 8(f) of the NLRA evidences Congressional approval of Master Labor Agreements. National Labor Relations Act, 29 U.S.C. 151(e)(f). By virtue of these sections, private construction contractors can require that employees abide by collective bargaining agreements, regardless of the potential impact upon the free play of economic forces. Thus, since Congress has expressly authorized the use of such agree-

ments there is no conflict with federal labor relations policy. Accordingly, under the *Machinist* doctrine, there is no implied preemption with respect to the Master Labor Agreement in question.

**Conclusion.**

Public construction contracts constitute a core function of state and local government. Master Labor Agreements ensure timely completion of such projects. Thus, such agreements offer a valid mechanism for the efficient spending of public monies.

Because the impact of this decision would hinder the economic and environmental well-being of this City, we urge this Court to reverse the United States Court of Appeals for the First Circuit's decision.

Respectfully submitted,

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